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In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT J. L'HOSTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment was sufficiently plain, concise, and definite to satisfy the requirements of Rule 7(c)(1) of the Federal Rules of Criminal Procedure.

2. Whether the trial court committed plain error when it refused to instruct the jury on the distinction between bribery and goodwill expenditures.

3. Whether a district court has discretion to deny forfeiture under the racketeering enterprise statute, 18 U.S.C. 1963.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 609 F. 2d 796.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1980. A petition for rehearing en banc was denied on April 8, 1980. The petition for a writ of certiorari was filed on May 24, 1980, and is therefore out of time under former Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted of conspiracy to violate various federal and state laws (18 U.S.C. 371) and racketeering, in violation of 18 U.S.C. 1962(c). Petitioner Robert J. L'Hoste was sentenced to four years' imprisonment and fined a total of $35,000, but the district court declined to invoke the forfeiture provisions of the RICO statute against him. Petitioner R.J. L'Hoste & Company, Inc. was fined $35,000. Petitioner Clarence E. Rogers was fined $2,500 and placed on probation. Petitioner Marvin Cochran was also placed on probation. Petitioners' convictions were affirmed on appeal. In addition, acting upon a mandamus petition filed by the government, the court of appeals ruled that the district court should order the forfeiture of Robert L'Hoste's interest in his company.

The complex procedural history of this case is summarized in the court of appeals' thorough opinion (Pet. App. 5a-6a). Here it is sufficient to note that, at the end of their third jury trial, petitioners were convicted of participating in what the court below aptly characterized

as "a labyrinthine plot of public bribery" involving the award of sewer contracts in Jefferson Parish, Louisiana (Pet. App. 6a). The evidence, as summarized by the court of appeals (*id.* at 6a-7a), showed that between 1970 and 1977, the parish awarded sewer contracts on an emergency "no-bid, cost-plus" basis, on the recommendation of Ray Condon, the director of its Department of Sewerage and Drainage. The contracts, financed in large part with federal funds, would have been performed at a substantially lower cost had they been put out for competitive bidding. L'Hoste & Company received 77% of the "emergency" work, totalling over $5 million, through a scheme of kickbacks to Condon and others. Contract costs were padded with excessive payrolls and machinery rentals. Job costs, and consequently L'Hoste & Company's profits, were further inflated when L'Hoste, without good reason, directed that the work be delayed. One job that normally should have taken a month took nearly eight months. The dilatory tactics included working at a slow pace or simply loafing, digging up good pipe, making unnecessary repairs, and stopping up water pipes. While on L'Hoste & Company's payroll, employees also did construction and landscaping work at Condon's residences. Some of the equipment charged off to the job was run merely to make noise; some was run only when an inspector was present; and some was inoperable. The inflated equipment rentals were channeled to Condon, Frederick Hoth (consulting engineer for the Department of Drainage and Sewerage), and others through conduit rental companies in which they held interests (Pet. App. 6a-7a).

The evidence showed that petitioners' bribes took many forms besides excessive payments for unnecessary equipment rented from companies owned by parish officials. There were also gifts of land, hunting trips, vacations to

places such as Acapulco and Hawaii, and many campaign contributions in excess of $10,000 (Pet. App. 14a).

The defense attempted to show that the responsibility for the delays and the goldbricking rested with Carl Calamia, who had been general superintendent of L'Hoste & Company before he was fired (Pet. App. 7a). The defense also vigorously attacked the credibility of the government's most damaging witnesses, Calamia and Hoth, who both testified under grants of immunity (Pet. App. 14a). Finally, petitioners claimed that the vacation trips they admitted giving to parish officials and inspectors were mere "goodwill" expenditures that could not be considered bribes under Louisiana law. The balance of the alleged bribes were claimed to be legitimate campaign contributions (*ibid.*).

ARGUMENT

1. Petitioners contend (Pet. 8-11) that the indictment did not comport with the requirements of Rule 7(c)(1), Fed. R. Crim. P. This claim is frivolous. The government modified the indictment twice in an effort to meet petitioners' objections to its form (Pet. App. 53a-67a). It is "a plain, concise, and definite written statement of the essential facts constituting the offense charged" within the meaning of Rule 7(c)(1). As the court of appeals stated (Pet. App. 8a-9a):

> [I]ts length and complexity were necessitated * * * by the nature of the crimes charged. Both counts alleged violations of Louisiana and federal law spanning more than seven-and-one-half years and involving more than a dozen different parties. Due to the intricate interrelationships among the many parties within this extended time frame, a lengthy indictment was required to set forth the elements of the offenses charged, to give the defendants adequate notice of

the charges, and to provide a basis for a former jeopardy plea in any subsequent criminal proceedings stemming from the defendants' conduct in this case.

2. Petitioners next contend (Pet. 12-14) that the trial court erred when it declined to instruct the jury on the distinction between "goodwill" expenditures and bribery. This claim has no merit. We rely upon the exhaustive treatment of the issue in the opinion of the court of appeals (Pet. App. 14a-24a), which specifically explains (*id.* at 18a-21a) why petitioners are incorrect in arguing that the decision here conflicts with *United States* v. *Arthur*, 544 F. 2d 730 (4th Cir. 1976).

3. Petitioners' final claim (Pet. 14-17) is that the court of appeals erred in ruling that the district court had no discretion to deny forfeiture of petitioner Robert J. L'Hoste's two-thirds stock ownership in L'Hoste & Company after the jury determined that his ownership interest was subject to forfeiture under 18 U.S.C. 1963(a). The court of appeals' decision is correct (Pet. App. 26a-36a); it is, moreover, the first decision to address this question. In the absence of a conflict there is no reason for this Court to grant review here.[1]

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[1]Petitioner concedes (Pet. 14) that the question presented here "has not been decided by any other appellate court," but he then suggests (Pet. 16) that the court of appeals' decision conflicts with *United States* v. *Huber*, 603 F. 2d 387 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980). *Huber* merely stated in dictum that a district court has "a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provisions." *Id.* at 397. The district court's order in *Huber* had provided that the defendant could redeem and repossess himself of the forfeited corporate entities upon payment of $100,000 to the Attorney General (*ibid.*), and the government had not opposed that provision of the order.

Petitioners provide no answer to the court of appeals' careful and compelling analysis of this issue.[2] They offer only two arguments in support of their position. First, they rely (Pet. 15) on Judge Tate's statement (Pet. App. 42a) in his dissent from the court of appeals' denial of rehearing en banc that he could not believe that Congress intended "to leave to a prosecutor alone the determination to achieve forfeiture of an accused['s] * * * property," particularly since the racketeering acts might be isolated incidents in the conduct of an otherwise legitimate business. Second, petitioners argue (Pet. 16-17), echoing Judge Tate (Pet. App. 41a-42a), that a district judge has discretion to suspend the forfeiture under the provisions of the federal Probation Act, 18 U.S.C. 3651-3656. Neither of these arguments is convincing.

Congress has not placed unwarranted power in the hands of the prosecutor with respect to forfeitures. The prosecutor's power to obtain a forfeiture of property used in a racketeering enterprise by charging and proving a violation of the racketeering statute differs in no significant respect from his power to obtain particular penalties under any other type of mandatory sentencing statute (see, *e.g.*, 21 U.S.C. 841(b)) or his power to subject a defendant to the possibility of harsher punishment by charging him under one statute rather than another for conduct that might be charged under either one. This Court has recognized that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979). Nor does it matter that, in choosing to prosecute an individual under one statute rather than another that might also apply, the prosecutor may be "influenced by the penalties available upon conviction." *Id.* at 125.

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[2]We do not repeat the court of appeals' analysis here, but we rely upon it.

Petitioners' suggestion (Pet. 15) that the nature of the forfeiture penalty makes prosecutorial discretion more problematic because it is an exception to the prohibition in 18 U.S.C. 3563 against "forfeiture of estate" is erroneous. The forfeiture authorized by 18 U.S.C. 1963 is, in contrast to the traditional common law forfeiture of estate, "extremely narrow" (*United States* v. *Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), applying only to property with a specified nexus to the racketeering enterprise through which a defendant has been found to have committed violations of the racketeering statute. And Congress has provided a safeguard in Fed. R. Crim. P. 31(e), requiring that "a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

In any event, administrative controls exist to deal with any potential problem of abuse of the racketeering statute by overzealous local prosecutors. No RICO prosecution may be initiated without the prior approval of the Criminal Division of the Department of Justice. Moreover, Congress has provided an additional safeguard in 18 U.S.C. 1963(c), which states in pertinent part:

> All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeiture for violation of the customs laws * * * shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof.* * *

This provision has so far not been interpreted by the courts or, indeed, by government regulation. A similar provision in 18 U.S.C. 1955(d)[3] has, however, resulted in the promulgation of regulations that place the responsibility for passing upon petitions for remission or mitigation (after a trial determination of forfeitability) on senior officials within the Criminal Division of the Department of Justice, including the Assistant Attorney General. See 28 C.F.R. 9a.7 and 9.3. Thus, assuming that a similar procedure will govern petitions for remission or mitigation under 18 U.S.C. 1963(c), the ultimate decision whether to forfeit property and the extent of the forfeiture will reside with responsible officials of the Department of Justice, not with the local prosecutor.

Finally, if a jury believes that a forfeiture sought is unduly harsh, it is free to exercise its traditional nullification power in connection with its special verdict determining the extent of the interest or property subject to forfeiture; and the courts have made it clear that they would not hesitate to invalidate forfeitures which they deemed so disproportionate to the seriousness of the criminal activity involved as to violate the Eighth Amendment. *United States* v. *Marubeni America Corp.*, 611 F. 2d 763, 769 n.12 (9th Cir. 1980); *United States* v. *Huber*, 603 F. 2d 387, 397 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980).

Petitioners' reliance (Pet. 16-17) upon the federal Probation Act provision respecting suspension of sentence, 18 U.S.C. 3651, is equally misplaced. Section 3651 repeatedly speaks in terms of the suspension of fines

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[3]18 U.S.C. 1955, the federal gambling statute, was enacted as Title VIII of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 937. The RICO statute originated as Title IX of the same Act.

or imprisonment. As to forfeiture, however, Section 3651 is silent. Had Congress wished to give district courts the power to suspend forfeiture penalties, it could have amended the terms of Section 3651 so to provide, just as it made several changes in the Federal Rules of Criminal Procedure to accommodate the new criminal forfeiture provisions of the RICO statute and 21 U.S.C. 848. See Fed. R. Crim. P. 7(c)(2), 31(e), and 32(b)(2).

Moreover, as the court of appeals stated (Pet. App. 36a), "the rationale that motivated Congress to reinstitute the [criminal] forfeiture penalty indicates that it was enacted to serve a purpose other than that of a criminal sentence involving a fine or imprisonment." Although forfeiture is technically a penalty, its purpose is remedial, like that of the civil remedy provisions of the RICO statute, 18 U.S.C. 1964-1968. It was designed to deprive criminal organizations "of their economic base so that they could not easily continue illegal activities" (Pet. App. 36a). Having already made the policy decision to attack organized crime through its economic base, Congress had no reason to give district judges the power to interfere with such a policy. The Congress that enacted the RICO statute was, in fact, exasperated by the lenient sentences often meted out to the most important organized crime figures. For that reason it also passed the Dangerous Special Offender Sentencing statute (18 U.S.C. 3575-3578) as Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 948. See S. Rep. No. 91-617, 91st Cong., 1st Sess. 85-87 (1969). The same Congress shortly thereafter passed the Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265, which drastically limited district judges' sentencing discretion with regard to organized crime management personnel. See 21 U.S.C. 848(a) and (c) (Continuing Criminal Enterprise) and 21 U.S.C. 849 (Dangerous Special Drug Offender

Sentencing). Thus, "Congress' failure specifically to authorize [the judicial act at issue] was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice." *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980), slip op. 18-19. All of these considerations lend support to the court of appeals' analysis and to its conclusion that Congress intended the forfeiture provisions of the RICO statute to be mandatory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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